No. 2509

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

GREAT NORTHERN RAILWAY COMPANY, a Corporation,
Plaintiff in Error,

vs.

GRACE MUSTELL, as Administratrix of the Estate of Fred G. Mustell, Deceased, and as the Personal Representative of Said Fred G. Mustell, Deceased, for and on Behalf of Grace Mustell and Ruth Mustell, the Widow and Minor Child, Respectively, of Said Fred G. Mustell, Deceased,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Upon Writ of Error to the United States District Court for the Eastern District of Washington, Northern Division.

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McKEE PRINTING CO., SPOKANE.

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STATEMENT OF THE CASE.

This case comes before this court upon a writ of error to the District Court of the United States for the Eastern District of Washington, Northern Division, plaintiff in error being the defendant in the court below. Hon. Frank H. Rudkin, District Judge, presided over the trial.

This action was brought under a complaint alleging a cause of action under the Federal Employer's

Liability Act. It was claimed at the time of the injuries which resulted in the death of Fred G. Mustell that he was employed in and the defendant was engaged in interstate commerce; that he died on the 29th of September, 1913, by reason of injuries received in the Hillyard yards of the defendant; that he was employed as a car checker; that the yards were used for the purpose of making and breaking trains, in which yards defendant employed continuously switching engines and crews, and that at the time of the happening of the injuries, defendant had there numerous trains of cars which it was the duty of Mustell to check, and to take checking records to the yard office for defendant's use; that at the time of his injuries he had made out a record of cars upon one of the tracks and was carrying the same to the yard office, and while passing over Track 1, a line of fifteen freight cars was suddenly and violently moved upon him, knocking him down, running over him and causing the injuries which resulted in his death on the same day; that this string was coupled into by another string, to which was attached a switch engine, and was moved from two to four car lengths before it stopped.

It was alleged that it was the custom in the yards not to move such a string unless a man was placed and standing upon the front end, to protect against collision with things or persons; that Mustell knew of this custom and relied on it, and that the string was moved in violation of this custom, and without

a man on the end of the string; that the string was moved violently, quickly, unexpectedly and without warning; that Mustell was unable to escape from being run down and injured, that the movement was of extraordinary character, and not the usual manner in which cars were moved in order to accomplish the results desired by the switching crew.

Plaintiff alleged that the cars checked by Mustell contained freight destined to points without the State of Washington, and that there was no man upon the top of the cars which struck and injured him.

The complaint charged that defendant failed to provide proper rules for the purpose of warning Mustell of threatened danger, or to provide any rules in and about the switching operations; that if such rules had been provided and enforced, Mustell would not have been injured or killed. It was claimed in the complaint that the shops of the defendant were located at Hillyard; that there was a large number of men working there, who were required to cross the tracks of the defendant; and that the plaintiff's intestate was required to cross during switching operations, and that often it would be impossible to see or to determine just what cars would be liable to be moved; that it was necessary that rules be promulgated to make it the duty of switching or engine crews to give warning by whistle or bell, or by a man on the far end of the cars that the cars were being moved, and that no rules were promulgated.

Damages were claimed by the plaintiff as the personal representative of Mustell on her own behalf, and for the benefit of her daughter. (*Transcript pp.* 1-13.)

The defendant admitted that at some times and places it was engaged in interstate commerce and at other times and places in intrastate commerce; that Mustell died on September 29, 1913, of the injuries received at Hillyard; that part of his employment was that of a car checker; that trains were made up and broken in the yards at Hillyard, and that it had at all times employed continuously switching engines and crews, engaged in making up trains in these yards, and admitted that it was part of Mustell's duties to pass over and cross the tracks for the purpose of checking cars, and that immediately before his death he had been, among other things, checking cars, and while upon Track 1 he came in collision with a freight car; that this car was coupled onto a string of cars, and that the string did not move to exceed four car lengths. The allegation with reference to the custom of placing a man on the front end of the string of cars was specifically denied, as was also the allegation relating to the unusual and extraordinary character or manner in which the cars were alleged to have been moved. It was admitted that at the time of Mustell's death, the defendant's employes were engaged in switching cars in the yards; that immediately prior to his injuries and death, part of the work in which he

was engaged was that of car checker, and that he was going from one of the tracks in the yards of the defendant over and across another track, and that some of the cars which he had checked contained freight destined to points outside of the State of Washington; that at the time of Mustell's death there was no man stationed on the top of the cars which struck and injured him; that prior to his death he was conveying to the depot certain information and data, contained upon his checking list, which was obtained by him for the use of the defendant in switching and making up its trains and cars.

It was further admitted that certain shops were located in the yards, and that a number of men were employed in and about the same, and that some of the employes were required to go over and across the tracks of the defendant. Defendant specifically denied that the defendant was negligent in not providing or enforcing rules to warn Mustell, or that it was the duty of the switching crews or engine crews to warn him by whistle, bell or placing a man on the far end of the cars, and denied that the plaintiff had any cause of action against the defendant.

As a second defense, contributory negligence was alleged. As a third defense, it was alleged that Mustell knew of the dangers of his employment, appreciated them, and assumed the risks thereof. (*Transcript* 14-19.)

The plaintiff by her reply denied the second and third defenses of the defendant. (*Transcript* 20.)

The case was tried upon September 18th, and at the conclusion of the plaintiff's testimony, a motion for non suit was made, which was denied. (*Transcript* 65.) At the conclusion of all the testimony defendant moved for a directed verdict, on the ground that no cause of action, either under the Employer's Liability Act, common law or the state statutes had been shown; that the evidence did show, as a matter of law, that at the time Mustell received the injuries which caused his death, he knew the dangers of his employment, was familiar with the movement and manner of the work in the yard, and that he assumed the risk thereof; that the accident was caused by his own negligence, and that the negligence covered by the allegations of the complaint had not been shown to have been sustained by the evidence producd upon the trial. (*Transcrip* 95.)

In the discussion of this motion upon the suggestion by the court that he would let the case go to the jury, the defendant could have his ruling reviewed by the Circuit Court, or he might himself review it upon application, and objection by the defendant that that would mean a new trial and that judgment in favor of the defendant could not be gotten in that way (*Transcript* 95), plaintiff's counsel consented that if a verdict should be rendered for the plaintiff that the court might con-

sider the motion for judgment non obstante, without question; that this was done in order to save the necessity of another trial, and that the case could be settled in one trial, and it was agreed by the plaintiff's attorney that this agreement should apply to the Circuit Court of Appeals. (*Transcript* 96.)

The motion to direct a verdict was then denied and exception allowed. Whereupon the defendant moved the court to withdraw and exclude from the consideration of the jury the question of negligence as to the claim that the movement in question was unusual or extraordinary or a negligent movement, or that there was any negligent handling of the cars, on the ground that there was no evidence to support the same, which motion was denied by the court and exception allowed. (*Transcript* 96.)

The court then instructed the jury, and at the conclusion of his instructions stated that he would submit a special interrogatory as to whether the train movement which caused Mustell's death was a running switch. This was objected to by the defendant, upon the ground that the court should have submitted special findings upon the other grounds of negligence upon which plaintiff relied. (*Transcript* 97.) The jury was recalled for the purpose of charging them with reference to an admission of plaintiff's counsel that they should not consider the question of pain and suffering. Defendant's counsel then requested that if the court was going to bring the jury back that the court submit to the jury

special findings with reference to the other three grounds of negligence, and the court stated to the jury that he would submit some other questions to be answered by it in connection with the general verdict. It was agreed between counsel that the form of the special questions to be submitted to the jury should be in the language in which they were subsequently submitted. Counsel for plaintiff stated that he had no objection to submit these special findings. (*Transcript* 98.) Defendant's counsel stated that he desired to renew his objection to the submission of special findings to the jury after the case was argued; that it was the position of the defendant that no special findings at all should have been submitted to the jury after argument, without notice to the counsel for the parties, and that if the court was going to submit any findings to the jury, then that all the questions should be submitted for their consideration. (*Transcript* 99.) The questions covering the negligence charged in the complaint were then submitted to the jury, and the jury retired and returned a verdict for the plaintiff for $5,750, apportioning to the widow $3,450 and to the daughter $2,300.

The questions submitted and the answers returned by the jury were as follows:

1. Was the train movement which caused the death of Fred G. Mustell a running switch, within the intent and meaning of the rules of the defendant company? Answer: No.

2. Was it the custom of the defendant to place a man on the head car when moved in the manner the car in question did move, and did Mustell rely on this custom? Answer: No.

3. Were the cars which struck Mustell moved in a manner extraordinary or unusual? Answer: Yes.

4. Was the defendant negligent in failing to provide a rule for the warning of employes such as Mustell? Answer: No.

5. Did Mustell assume the risk. Answer: No unusual risk.

6. Was the negligence of Mustell the sole cause of his death? Answer: No. (*Transcript* 99.)

The verdict was returned upon September 22nd, and upon September 29th the defendant made its motion for judgment notwithstanding the verdict, upon the grounds that it was not guilty of negligence; that it exercised all the duties imposed upon it by law, and used care to furnish the plaintiff's intestate a reasonably safe place in which to work; that no cause of action had been proven against the defendant; that there was no cause of action proven under the Federal Employer's Liability Act; that the plaintiff's intestate assumed the risk, and that as a matter of law the plaintiff was not entitled to a verdict, but that the defendant was entitled to a verdict and was entitled to judgment; that the evidence did not show that the defendant negligently

moved the car which came in collision with Mustell, or that the movement was of an extraordinary character, or was made in a negligent manner, or that the collision was caused by the negligence of the switching crew, or that the car was moved without reasonable care by the defendant; that the jury having specially found in favor of the defendant with reference to the other particulars of negligence alleged, and there being no evidence to support the other charges of negligence, that no cause of action has been proven; that the evidence was insufficient to sustain a verdict, in that the evidence conclusively showed that the car which came in collision with Mustell was not moved in a negligent, unusual or extraordinary manner; that it did show that the car was moved in the ordinary and usual manner of moving such car. (*Transcript* 101-103.) Defendant in making this motion expressly waived the right to a new trial, and asked for judgment notwithstanding the verdict. (*Transcript* 104.)

The motion for judgment notwithstanding the verdict was presented, but no argument was made, and the court denied the motion, allowing an exception to the defendant. (*Transcript* 105.) Judgment was entered in favor of the plaintiff on the verdict (*Transcript* 105), and the defendant excepted to the rendering and entering of the judgment and to the judgment, which exception was allowed. (*Transcript* 106.) The bill of exceptions was settled (*Transcript* 107), assignment of errors filed and

writ of error prosecuted to this court by petition for a writ (*Transcript* 111), which writ was allowed (*Transcript* 112), supersedeas bond ordered filed and allowed (*Transcript* 113-116) and writ of error issued and allowed (*Transcript* 114) and citation issued and served.

ASSIGNMENT OF ERRORS

The following errors specified as relied upon, and each of which is asserted in this brief and intended to be urged, are the same as those set out in the assignment of errors appearing in the printed record.

I.

That the United States District Court, in and for the Eastern District of Washington, Northern Division, erred in denying the motion of the defendant to direct a verdict in favor of the defendant, made at the close of all the evidence in the case, for the following reasons:

1. That the evidence did not show any negligence on the part of the defendant.

2. That the evidence did not show any cause of action in favor of the plaintiff and against the defendant, under the Federal Employer's Liability Act.

3. That the evidence did not show any cause of action in favor of the plaintiff under the common law, or under the statutes of the State of Washington.

4. That the evidence showed, as a matter of law, that at the time and place the deceased received the injuries which caused his death, he knew the dangers of his employment, was familiar with the movement and manner of work in the yards, and that he assumed the risk thereof.

5. That the evidence showed that the accident was caused by the negligence of said Fred G. Mustell.

6. That the negligence alleged in the complaint was not shown to have been sustained by the evidence produced on the trial.

II.

That the court erred in denying defendant's motion for judgment notwithstanding the verdict, upon the following grounds:

1. That the evidence did not show any negligence on the part of the defendant.

2. That the evidence did not show any cause of action in favor of the plaintiff and against the defendant, under the Federal Employer's Liability Act.

3. That the evidence did not show any cause of action in favor of the plaintiff under the common law, or under the statutes of the State of Washington.

4. That the evidence showed, as a matter of law, that at the time and place the deceased received the injuries which caused his death, he knew the

dangers of his employment, was familiar with the movement and manner of work in the yards, and that he assumed the risk thereof.

5. That the evidence showed that the accident was caused by the negligence of said Fred G. Mustell.

6. That the negligence alleged in the complaint was not shown to have been sustained by the evidence produced on the trial.

III.

That the court erred in ordering judgment to be entered in said action, in favor of the plaintiff and against the defendant.

IV.

That the court erred in rendering and entering judgment in said action in favor of the plaintiff and against the defendant. (*Transcript* 108-110.)

STATEMENT OF FACTS.

On the four specifications of negligence relied upon by the plaintiff, the jury found in favor of the defendant upon three of them, and consequently the plaintiff in error, defendant below, who will hereafter be referred to as defendant, will not discuss the evidence relating to these three findings, nor to the facts which were admitted upon the trial. The jury found that it was not the custom of the defendant to place a man on the head of the car

when moved in the manner the car in question did move, and that Mustell did not rely on that custom; that the defendant was not negligent in failing to provide a rule for the warning of employes such as Mustell; that the train movement which caused the death of Mustell was not a running switch, within the intent and meaning of the rules of the defendant company (*Transcript* 22). Plaintiff did not offer any proof to show that it was customary to blow the whistle or ring the bell (*Transcript* 72), and Mustell's familiarity with the movements of the trains in the yards was admitted. (*Transcript* 88.) The general nature of the movement of the cars immediately preceding the accident was admitted (*Transcript* 89). It is not disputed that the accident happened at about two o'clock in the afternoon, in the daylight (*Transcript* 98).

Fred Mustell, who was 23 years of age at the time of his death, had worked as night yard clerk for the defendant in its yards at Hillyard in September, 1909, and from that time until October 1st, 1910, when he became day yard clerk. In January, 1911, he became weighmaster, and shortly after that manifest clerk and car checker, and continued in that employment until the time of his death (*Transcript* 62) on September 29th, 1913 (*Transcript* 14). He had been employed around the yards for over two years prior to his death (*Transcript* 73). As weighmaster he used to weigh a great many cars and it was his duty to be down near the scales,

which are shown on Plaintiff's Exhibit 2 as the old scales upon Track 1, to weigh cars. In doing this weighing cars would be shoved onto the scale and cut off, weighed and then kicked off, without a man upon the end of the cars. He often rode in the engine from one end of the yard to the other (*Transcript* 71). When he was instructed in his duties as car checker, which was nearly two years before the accident (*Transcript* 62) he was told about the different dangers, such as approaching trains, switch engines, crossing over tracks or under cars or through cars; told to go down by the lead and then cross over, about movements on the tracks, and that he could always expect switch engines working at both ends and expect trains moving at any moment, and always to keep clear of them (*Transcript* 84).

An examination of the map, Exhibit 2, which was stipulated was correct, will show the place where the accident occurred; that he was struck at point "A" on Track 1, which was 1025 feet from the lead near the depot; that he was coming from Track 5 and his direction is shown upon the map by the letter "B."

The yards at Hillyard were used for the making up and breaking of trains, and were known as classification yards. There is a hump in the center near the word "yards"; west of that hump the yards are level and east of it they slant down towards the east (*Transcript* 67). On the morning of the accident and the day previous, Mustell had been instructing

Henry Cantley in the duties of car checker (*Transcript* 77). He told Cantley that very day to be careful; that they were liable to switch cars there most any time and kick a bunch of cars in there, and he would get hurt by them (*Transcript* 77). In the afternoon just previous to the accident, Mustell and Cantley had been out checking a train that had come in an hour before, which had been placed on Track 5. They had completed their check and started over from Track 5 to the place where the accident happened, practically across the tracks. In going across these tracks they were not engaged in any work which distracted their attention at the time from what they were going to do, nor was Cantley engaged in any conversation with him at the time (*Transcript* 37). They had been checking the records of seals, Mustell marking the destination of cars, and they were going to the depot and turn in their checks (*Transcript* 32). They were not paying any particular attention when they got close to Track 1 to see if there was anything to indicate that a train of cars was being moved on that track in the direction of the string of cars that struck Mustell (*Transcript* 33). Just before crossing Cantley glanced up and saw an indication of where a switch engine was by the smoke, which was apparently going straight up. He couldn't very well say whether the engine was standing still or going because sometimes when the engines worked hard the smoke goes straight up and other times it does not,

nor could he say whether or not he heard an engine moving (*Transcript* 33). He didn't pay any attention to the fact that there was or was not an engine working up there, only as he saw the smoke (*Transcript* 39). He didn't see the cars come against the other cars (*Transcript* 35). Neither Cantley nor Mustell were paying a great deal of attention to where they were going or anything. A. Thomas, a car repairer, saw him just about the time they got to the track that the cars were standing on, and he started to cross, and he didn't see Mustell look up (*Transcript* 82). When Cantley and Mustell got close to Track 1 they were crossing about the same time (*Transcript* 82). The first indication that Cantley had that the cars were moving on the track was when he heard the crash of the coupling. The end of the car that Mustell and he were passing by at that time moved very quickly and hit Mustell (*Transcript* 34). Mustell was ahead of Cantley and a little to his left, about five or six feet ahead of him, and when the car struck Mustell it knocked him across the rail on the outside, on the north side of the track. Cantley had one foot across and jumped back (*Transcript* 37). Mustell was observed by Thomas starting to cross pretty close to the car (*Transcript* 83). Cantley who testified for the plaintiff in response to questions of plaintiff's attorney, as to how close Mustell was to the car, said it was about three or four feet, somewhere along there; that he wouldn't be positive, and indicated

a distance from where he was sitting to the bannister, which upon measurement was found to be about two feet (*Transcript* 38). He said, as he did upon a prior trial of the case in the state court, that he wouldn't swear to the distance, as to whether it was one foot or ten feet (*Transcript* 41), but he testified on the other trial substantially as he did upon this trial that the distance was between two and three feet, over two feet, he couldn't tell exactly (*Transcript* 42).

The switching crew which made the switch which resulted in a collision between the car and Mustell, was composed of a switch foreman, Steinhouse, a man who followed the engine, Farmer, and a field man, Miller. Ten cars had been put in on Track No. 1, and Miller had set three brakes upon the end cars, to hold the cars in far enough so that they could project some more cars against them. The crew went back and got some more cars from off of the other tracks, pulled up on the lead and started to back in on Track 1, with Miller on the ground to make the coupling (*Transcript* 75). The purpose of the movement was to make room for some other cars on Track 1 and to push the cars in far enough to clear the lead, so that they could have a view of the other tracks, and in order to clear the lead, the string would have to be at least three car lengths from the point of the switch (*Transcript* 76). The practice was if the movement was not to go over the hump, to put one to three brakes on,

sufficient to hold the cars, while they projected others against them to ensure coupling (*Transcript* 76). Miller was fixing the coupling on the end of the car that was attached to the engine. Before they made the coupling they rolled the cars down against the other cars. The pin did not drop. Miller signalled the engineer to back and they made the coupling. They were not hit hard enough when they first met to drop the pin down. The two cuts lacked possibly two feet, and the coupling was not made by two feet. The first time it never moved the string of cars. Miller then signalled them to back, and the cars came right on through (*Transcript* 66). He was walking alongside of the cars and they were not going any faster than he was. The intention was to shove these cars back three or four car lengths for a little room and put two or three more cars on top of them (*Transcript* 66). After the cars were coupled and had gone probably a car or a car length and a half, Farmer made the cut (*Transcrip* 65). The engine kept on shoving the cars after they had coupled on (*Transcript* 66, 75, 44, 49). The movement that took place was a shove, which is when a switch is made against a bunch of cars, they are all coupled up and shoved down the track and cut off when they start to leave (*Transcript* 67). Steinhouse, the foreman, gave the sign to push the cars, at the same time giving the sign for the man following him to cut the cars off, and just at that instant he saw Mustell fall. The cars

had already got started, and he immediately gave the sign to the engineer to stop, and he stopped (*Transcript* 75). The engine surely shoved that string of cars (*Transcript* 77). None of the switching crew knew that Mustell was near the end of the cars.

(*Transcript* 66, 80, 42, 43, 44, 65-69, 75, 76, 77, 87, 89).

Cantley heard the crash of the cars up ahead at the time they struck. He was not paying any attention to the fact that the slack was being taken up (*Transcript* 39).

During the three or four months that Miller had worked in the yards they had made similar movements to this one every day, and he had known and seen Mustell around the yards while these movements were going on (*Transcript* 66, 67). The fireman was on the gangway when they hit the cars. It had no effect on him. That movement and similar movements had happened in the yards before that time and was a very frequent occurrence. It came under the head of every day switching. It had been going on during the two years he had been in the service (*Transcript* 72). Foreman Steinhouse, who had been in yard service for nearly five years, testified that practically the whole movement up to the time the stop signal was given on account of the accident, was not an unusual movement, but was practically routine; that it was continually done all day long (*Transcript* 75). On

cross-examination he testified it was a usual movement, both as to extent and force; no difference in either (*Transcript* 76). Henry Cantley who was with Mustell at the time of the collision said that there was no difference in particular in the movement of the car at that time than any other movements in the yard previous to that (*Transcript* 78). He testified that it kicked very quickly; didn't see anything different between that and the kicking of other cars that he had observed in the yards there (*Transcript* 79). Thomas Farmer, who followed the engine, said there was no sudden jerk or smash of the engine (*Transcript* 80). Thomas, the car repairer, who worked in the yards, said that the movement was nothing more than the movements that were made daily (*Transcript* 82). Anderson, who was familiar with the movements in the yards, and who was on the ground a minute and a half after it happened, testified that this movement occurred frequently in the yards, and that he had been with Mustell several times prior to the accident when movements similar to this occurred (*Transcript* 85). William Bond, assistant yardmaster, who saw the movement, said that the speed was not very fast, just enough to move the cars a little bit; that it didn't take much to move them three or four car lengths; that this was a common movement in these yards and the every day movement in every yard that he had ever been in. Mr. Garvin, the yardmaster for the Northern Pacific, testified that it was usual; that he had seen similar switch movements

performed before in Hillyard and other yards; that when a movement similar to this one was made the end car started very suddenly; that this was an every day movement (*Transcript* 91-94).

Every one of the witnesses who saw or was present at the time of the accident testified that the movement was the ordinary and usual movement in the yard, and was not extraordinary or unusual. The same customs existed at the time of the accident as existed for ten years before in the yards, with reference to switching operations, the movement of cars, giving of signals, if any, or the failure to give them, if any, and all things incident thereto (*Transcript* 49).

The yards in which this accident occurred were the ordinary classification or switching yards of a railroad company. The yards were sometimes crowded with cars and sometimes not. They were practically level from the point where Cantley and Mustell were crossing west of the depot (*Transcript* 39). The shops were located at the west end of the yards, and employed from two hundred to five hundred men. There were five or six engines working in the yards, with the usual crew of five men, two shifts of car inspectors, oilers and airmen, or six men in a shift, two car clerks, yardmasters, conductors and brakemen, with the trains arriving and leaving at terminals from six to eight trains in and out a day (*Transcript* 50). These men usually crossed west of the depot, about a thousand feet

west of the place of the accident (*Transcript* 51). The men who were employed in the yards were the yard office clerks, car checkers, car inspectors, switching and train crews and yardmasters. The car repairers work south of the classification tracks, which are tracks numbered 1 to 10, inclusive, and on these tracks trains are made and broken up and switched in and around in various ways at different times throughout the year, for the full length of the yard (*Transcript* 53). There are hardly any men that cross the yards down in the vicinity of the accident (*Transcript* 85). The engines are all headed west in these yards, so that the engineer can get the signals always on the same side, the north side (*Transcript* 67).

In carrying on switching operations in the yards, the switching crews did not pay any attention to Mustell or car repairers or any other fellows working around the yards, to see where they were (*Transcript* 67). During the time that Mustell was working there switch engines were moving around all over the yards, without notice or warning to him. Couldn't tell when the cars were going to move (*Transcript* 78, 79). It was not usual or customary to give warnings to the men who were working on the switch tracks (*Transcript* 81, 88).

ARGUMENT.

I.

THERE WAS NO EVIDENCE TO GO TO THE JURY UPON THE QUESTION AS TO WHETHER THE CARS WHICH STRUCK MUSTELL WERE MOVED IN AN EXTRAORDINARY, UNUSUAL OR NEGLIGENT MANNER, NO NEGLIGENCE ON THE PART OF THE DEFENDANT WAS SHOWN AND NO CAUSE OF ACTION WAS PROVEN UNDER THE FEDERAL EMPLOYER'S LIABILITY ACT. A VERDICT SHOULD HAVE BEEN DIRECTED FOR THE DEFENDANT, AND DEFENDANT IS NOW ENTITLED TO AN ORDER FOR JUDGMENT IN ITS FAVOR.

At the conclusion of the evidence the defendant moved to direct a verdict in its favor, for the reason, among others, that there was no evidence to show negligence on the part of the defendant. The record shows that the motion was denied, without discussion, upon the statement by the court that his ruling might be reviewed by the Circuit Court of Appeals, or that he might review it himself, and upon the express understanding made with plaintiff's counsel, that in the event a verdict was rendered in plaintiff's favor, the lower court could consider a motion for judgment notwithstanding the verdict, without question, and that the same agreement should apply to this court (*Transcript* 95, 96). The trial judge made an order denying the motion for judgment, expressly stating in the order that no argument had

been made thereon (*Transcript* 105). This court, therefore, is the first court to whom is presented a discussion of the entire lack of evidence to support the claim on the part of the plaintiff that negligence is shown in the manner in which the switching operations were conducted at the time of the accident. Before the case was argued to the jury, and after the denial of the motion for a directed verdict, the defendant specially requested the court to withdraw from the consideration of the jury the question of negligence as to the claim that the movement in question, which resulted in the collision with Mustell, was unusual or extraordinary, or a negligent movement, or that there was any negligent handling of the cars, on the ground that there was no evidence to support such charge of negligence (*Transcript* 96). This request was denied. It was made, however, before the court had decided to submit any special findings to the jury, and distinctly raised the question of the sufficiency or entire lack of evidence to sustain any charge of negligence on the only question of negligence which the jury found against the defendant; that is, the question as to whether or not the cars which struck Mustell were moved in an unusual or extraordinary manner.

The plaintiff's complaint and the evidence which was introduced raised four specific questions of negligence, upon which liability was sought to be imposed upon the defendant. One was the charge that it was customary for the defendant to place a man

on the head end of the car; that is to say, the end of the car which was nearest Mustell when he was struck, in the manner the car in question did move, and if so, did Mustell rely on that custom. The jury found that the defendant was not negligent in this particular.

The second charge of negligence was that the defendant had failed to promulgate rules for the warning of employes, such as Mustell, and this was submitted to the jury as a special question, and the finding was in favor of the defendant.

The third specification of negligence was whether the train movement which caused the death of Mustell was a running switch, within the intent and meaning of the rules of the defendant, and if so, then were the rules of the defendant violated constituting negligence on the part of its employes. This was found adversely to the plaintiff's contention.

The only other ground of negligence upon which the plaintiff can rely under her pleadings is the one which was submitted under the special finding number 3, "Were the cars which struck Mustell moved in a manner extraordinary or unusual?" to which the jury answered "Yes." This specification of negligence is covered by paragraphs 9 and 10 of the plaintiff's complaint. It constitutes the only possible ground upon which the plaintiff can claim that she might be entitled to recover, for if the movement was not extraordinary or unusual, al-

though it may have been negligent—which is contrary to the fact—the plaintiff would not be entitled to recover, for the evidence and admissions of counsel are conclusive that he was familiar with the yard movements, appreciated the dangers of the movement, and consequently must have been deemed to have assumed the risks thereof.

It appears, without dispute, that Mustell had been instructing Cantley in the checking of the cars for a day and a half; that he had been expressly warned himself during his own instruction, and was warning Cantley that very morning against the danger of cars being kicked down the track; that they had for an hour immediately preceding the accident been checking a string of cars on Track 5, and were proceeding with their check lists from Track 5 directly across to Track 1, upon which the string of cars was located which subsequently collided with Mustell; that they were not engaged in any conversation; that there was nothing to distract their attention; that Mustell was a few feet ahead of Cantley and to his left, and that they were not paying any particular attention to the engine on Track 1; that Cantley saw the smoke of the engine up there, and that he couldn't tell whether the engine was moving or not, for although the smoke was going straight up, sometimes when the engine was moving the smoke would then go straight up and sometimes not. It further appears they heard the crash of the coupling being made, and that when Mustell was within from two to

four feet of the end of the car, the car moved quickly, hit him, knocking him down, running over him, causing the injuries which subsequently resulted in his death.

The jury found that the defendant was not negligent in failing to establish rules for the purpose of warning Mustell, or placing a man on the end of the car for that purpose. The question, therefore, resolves itself into whether or not the movement itself was of such extraordinary or unusual character that Mustell was not bound to anticipate its happening. The movement which took place was as follows:

The train had just come in (*Transcript* 32). The cars were set on one of the tracks and the car checkers, including Mustell and Cantley, had been down marking the destination of the cars on them (*Transcript* 32, 74). Under the usual method of doing business the foreman goes down and makes a cut wherever he thinks he can handle them safely and handily; examines the cars and destination marks as the cars are being moved, throws up his fingers to designate the number of switch to be thrown, which switch is thrown by the field man after the foreman cuts off the cars for that track, and these cars are generally kicked in on that track. If the cars are going too far, the field man protects them by setting brakes. If the impetus was not enough to send them over the hump the cars stopped of their own momentum. If it was intended to

throw other cars against them, the field man would set two or three brakes (*Transcript* 74).

After this train had come in the switching crew had put from ten (*Transcript* 75) to fifteen (*Transcript* 43) cars on Track 1, and the field man set three brakes, enough to hold the cars in far enough so they could project some more against them. (*Transcript* 75.) They went back, got some more, and pulled up by the switch leading to Track 1 and started to back in (*Transcript* 75). The whole two strings contained from about sixteen (*Transcript* 43) to twenty or more (*Transcript* 65) cars. The purpose of the movement was to make room for some other cars on Track 1, to push them in far enough to clear the lead, so that the men could have a view of the other tracks (*Transcript* 76). They were intending to place these cars where they were afterwards placed. (*Transcript* 68). They were shifting in empties on Track 1, and were switching a train and getting the city loads out to Spokane. (*Transcript* 88). They were going to shove all the cars back three or four car lengths to put some cars on top of them (*Transcript* 66). Miller, the field man, was at the end of the string that was backing in on Track 1, and was on the ground to make the coupling between the string already on one and the string that was backing in (*Transcript* 65, 75, 43). Farmer was following the engine and was getting ready to make the cut behind the engine, after the coupling was made (*Transcript* 44).

They came down against the string of cars that was already on one, and did not hit them hard enough to make the pin drop, and although the slack ran out they did not make the coupling by about two feet (*Transcript* 66, 75). The first time they never moved the *string* of cars. It might have moved the *first car* an inch or two (*Transcript* 68). They then kept on going back, the coupling was made, and they came right on through (*Transcript* 66, 75). The foreman gave the sign to push the cars, and at the same time to make the cut (*Transcript* 75). The cut was made immediately after they had made the coupling, after they had moved somewhere around a car length (*Transcript* 75, 44). It was made about four or five cars from the engine (*Transcript* 44). The cars were moved altogether about four or five car lengths (*Transcript* 44). After the foreman had given the sign to push the cars and to cut the cars off, he saw Mustell fall, and he immediately gave the sign to the engineer, and then he stopped (*Transcrip* 75). When the engine was cut off it stood about a car length east of the switch on Number 1 Track (*Transcript* 68).

The entire evidence relating to the amount of force used and the ordinary or extraordinary character of the movement is as follows:

Cantley, who was with Mustell at the time of the accident, when called by the plaintiff as plaintiff's witness, testified upon direct examination:

The end of the car that Mustell and I were passing by at that time moved very quickly. It hit Mustell.

Q. Just state the relation between the coming together of the string of cars onto the cars that were standing still that you say you heard the crash—the relation between the crash and the movement of this car that hit Mustell; what I want to get at is, whether or not it was simultaneous or otherwise.

A. *Well, it moved very quickly afterwards; you know how it would be when coupling is made, how quickly the cars would move.*

Q. Well, I don't know, I don't know whether the jury would or not; but I just want to know whether there was any taking up of slack or anything of that kind before the other one moved, or whether as soon as the crash came the car that struck Mustell moved practically the same time.

A. Yes, sir. (*Transcript* 34.)

Upon cross-examination and as an illustration of the effort on the part of the plaintiff to keep out of the testimony the evidence relating to the exact movement which was made, he testified:

MR. ALBERT: Q. Now you spoke of them moving very quickly. I wish you would describe what you mean by that.

A. Well, in kicking as a usual thing, when they kick down—

MR. PLUMMER: We object to what is usual.

MR. ALBERT: That is the only way that the witness can tell.

MR. PLUMMER: No.

THE COURT: Describe this particular movement.

A. Well, when the engine comes into contact with the cars—

MR. PLUMMER: Just a moment. I have not asked you that.

MR. ALBERT: No, you have not asked him. I am asking him. You object.

THE COURT: He can testify in his own way. You may answer.

A. I mean when the engine hit these cars they moved very quickly and just as—well, I could not explain it in any other instance than comparing it with another. I could hear the crash of these cars up ahead only at the time they struck.

Q. Could you hear the slack being taken up?

A. *Well, I never paid any attention to that.* (*Transcript* 39).

Later, the defendant in order to bring out the facts with reference to the train movement, called Cantley as its own witness, who testified on direct examination as follows:

I had observed switching before around in those yards in a general way.

Q. *I will ask you whether or not there was any difference in the movement of that car at that time than other movements in the yards previous to that.*

A. *Not that I know of, in particular* (*Transcript* 77, 78.)

Upon cross-examination he testified:

Q. On this particular occasion, you being right behind Mustell as you have heretofore described and a considerable distance from where he was, you just barely had time to get out of the way so the car would not hit you, didn't you?

A. Yes, sir.

Q. On account of the quickness with which it moved?

A. Yes, sir.

Q. You didn't see anything to indicate that any car was coming against that string of cars, did you?

A. No, sir.

I just glanced up in a casual manner and saw the way the smoke was going straight up. *I didn't have the purpose in mind of seeing if there was any danger. As I said before you can't tell when the cars are going to move.* (*Transcript* 78, 79).

On redirect examination he testified:

Q. With reference to kicking this car down there, Mr. Cantley, you said it kicked very quickly. Now I want to ask you *how that compared with the kicking of other cars* that you had observed in the yards there.

A. *Well, as a general observation, did not see anything different.* (*Transcript* 79, 80.)

Thomas D. Farmer, the field man, was called on behalf of the plaintiff and later called on behalf of the defendant. Both Cantley and Farmer had been subpoenaed by both parties.

Upon direct examination in this case he testified:

The switch we were making at the time of the accident was a shove. The first I knew of the accident after I cut the cars off, I looked up and saw Mr. Mustell lying on the ground.

Q. *Was there any sudden jerk or smash of the engine there?*

A. *Not that I know of.* (*Transcript* 80.)

Upon cross-examination as plaintiff's witness, he testified:

> We came in and coupled on to that string and kept on shoving down the yards. That was the movement that took place there. I cut the string after we coupled and started to shove down. The engine and string kept on moving right down the track after the coupling was made until the cut. The cut was made after we had moved somewheres around a car length after they were coupled, and the cars kept on shoving down there, altogether about four or five car lengths (*Transcript* 44).

Upon redirect examination his attention was called by plaintiff's attorney to a statement which was in the handwriting of one of the attorneys for the plaintiff, Mr. Lavin, and which the witness could not read on account of such handwriting (*Transcript* 42). "Just before cars taken in by us reached cars standing on Track 1, Foreman Steinhouse ordered me to cut cars off, and I did so and cars struck the cars standing on Number 1, bumping them back four or five car lengths," which he testified was true (*Transcript* 45). The defendant then offered this statement in evidence, and asked the witness to state what the sequence of events was (*Transcript* 47). He testified positively that the engine shoved the cars after it coupled onto them (*Transcript* 45); that the engine shoved them back part of the distance four or five car lengths (*Transcript* 48) and that then they ran of their own momentum (*Transcript* 49).

This is all of the direct evidence which the plaintiff produced on the question of extraordinary or unusual movement or violence or negligent handling of the switch. From the testimony of these witnesses and the plaintiff's case alone, it is apparent that the cars moved with that quickness only which is usual when a coupling was made (*Transcript* 34, 39), and that no attention was paid by Cantley and Mustell to the slack being taken up (*Transcript* 39). Farmer's testimony with reference to the sequence of the movement which occurred, contains nothing which is inconsistent with proper, ordinary and usual switching. This testimony is positive that the cars were first coupled up, ran about a car length, and that a cut was then made, the cars continuing for a distance of about four or five car lengths in all. It will be remembered that Cantley's testimony fairly shows that at that time Mustell was within two to four feet of the end of the car, and even assuming that he was as far away as plaintiff's counsel attempted to draw the conclusion; that is, that he was ten feet away, the engine was not cut off until after Mustell had been struck.

Plaintiff's counsel will attempt to claim that because Mr. Lavin grouped together in a written statement in his, Lavin's, handwriting, which the witness was unable to read, two independent statements of facts, that it must necessarily follow that these facts existed in the order of the statement written by Mr. Lavin. The witness stated explicitly, time and

again, the order in which these events happened, first on direct examination, when called by plaintiff's counsel as his own witness (*Transcript* 43), again on cross-examination (*Transcript* 44), again on re-direct examination (*Transcript* 45), again on re-direct examination (*Transcript* 46), once more on recross-examination (*Transcript* 47), and again on redirect examination (*Transcript* 48). The witness reiterated his statement six different times, that the engine had coupled onto the cars and subsequently he had made the cut separating the cars from the engine. This was done after Mustell had been hit. Yet, counsel will argue that in spite of his own witness' statement, and in spite of the direct statement of the sequence of events, and the explanation of the written statement, that because Mr. Lavin, one of the attorneys, had written down two independent facts, one after the other, that therefore the actual fact occurred in the order in which Mr. Lavin had written them down, and not in the chronological sequence which the witness testified was the fact.

Plaintiff is bound by the testimony introduced on her behalf, and there can be no question but that the witness meant that which he testified to. This witness was subpoenaed by both the plaintiff and the defendant. He had talked to counsel for both parties, testified on the former trial, and was called by both parties. Cantley was also subpoenaed by both parties, and talked with the attorneys for both of them.

In spite of these facts, an effort will be made by counsel for the plaintiff to discredit their own witnesses' testimony, because they had talked with the attorneys and representatives for the defendant, who had subpoenaed both of them; and because of such attempted discredit claim their testimony is not to be believed, except in so far as it can possibly be construed to assist the plaintiff's side of the case. Either the testimony is to be believed, or not to be believed. If it is to be believed, then it is to be taken as competent, and if so taken there is not a particle of evidence in the case to substantiate the plaintiff's claim of extraordinary, unusual or negligent switch movement. If it is not to be believed, then the only possible testimony out of which even a claim of inference can be drawn is out of the case, and plaintiff's counsel himself must concede that there was no evidence to support such charge of negligence. But, giving to the testimony all the inference even which the plaintiff's counsel may desire to draw from it, even though way beyond the import of the evidence, there is no foundation for the deduction that this was a negligent movement; and, in fact, the uncontradicted evidence conclusively shows that the movement which occurred was one which was reasonably to be expected would happen in the ordinary switching in the yards.

The other testimony which relates to this question is as follows:

Miller, who was the field man, and whose business it was to make the coupling between the two strings of cars, testified:

> The train was all together after they were coupled up and it moved probably a car or a car and a half; I couldn't say exactly, something like that. The string of cars was moving eastward on down One. I was walking on the ground just a common ordinary walk. The string was rolling on opposite me and not going any faster than I was. . . . I had been employed about three or four months before in the yards. We made similar movements to that every day. I couldn't recall how many; according to how many trains was in, how many cars you have to handle. That is a very similar movement to doing switching. (*Transcript* 66.)
>
> I couldn't say whether the end car moved suddenly or not. That is the question he asked me, if they moved suddenly. (*Transcript* 69).

Christopher, the fireman who was on the engine which did the switching, says:

> At the time or just before this movement I was putting on fire when he hit the cars. I knew when he hit the cars, but I didn't notice anything more. There was no effect on my movement on the gangway that I noticed. I was not knocked around or anything of that sort. I have heard the movement described that happened at the time Mustell got hurt. I have heard the testimony of Mr. Cantley and Mr. Farmer and other witnesses who testified directly to it. That movement and similar movements had happened in the yard before that time, it was a very frequent occurrence. It comes under the head of every day switching. It has been going on during the two years I have been in the service. (*Transcript* 72).

Steinhouse, as switch foreman of the switching crew which was doing the switching, testified on direct examination:

> Q. I will ask you whether or not that movement, as far as shoving the cars in and coupling them and cutting them off is concerned—practically the whole movement up to the time you have the stop signal on account of this accident to Mustell—was an unusual movement in the yards or not?
>
> A. No, sir; that is practically routine. (*Transcript* 75.)
>
> Q. Had that been done at any time before that?
>
> A. Yes.
>
> Q. How often?
>
> A. Oh, I could not give the exact number of times; it is continually done all day long. (*Transcript* 76.)

Upon cross-examination by plaintiff's attorney he testified:

> This was a usual movement that was carried on this day, both as to extent and force of the movement. (*Transcript* 76.)

A. Thomas, a car repairer who was on track opposite the place of the accident, and who had sixteen years' experience in the yards, testified:

> The cars were moved, but I didn't notice just how hard or how fast they were moving; that is, they were kicked in.
>
> Q. What I mean is whether or not you observed this movement so you could tell whether it was similar or different from movements that had occurred in the yards at other times prior to that?

A. Nothing more than the movements as made daily there. I could not see any difference.

Upon cross-examination he testified:

Q. That was a similar kind of a kick movement you had seen made before, was it?
A. The same movement. (*Transcript* 82.)

Leslie Anderson, who had been in the Hillyard yards seven years and was yardmaster's clerk, testified:

I have heard the testimony relating to the movement of the trains and so forth. I was with Mustell several times prior to the accident, when movements similar to this occurred, similar to the movement which occurred just previous to his death. It occurred frequently in the yards. (*Transcript* 84.)

William Bond, the assistant yardmaster, who saw the switch movement, and who had had over twenty years' experience in switching, testified:

I saw the speed with which that movement was made. It was not very fast; just enough to move the cars a little bit. It don't take much to move them three or four car lengths there, it is level. I have had an acquaintance with the movement in the Hillyard yards ever since 1902. That movement is a movement that is liable to happen on any track there any day and it is happening every day. (*Transcript* 87.)

C. H. Gephart, who for ten years had been yardmaster there, and who was called as a witness for the plaintiff as well as for the defendant, testified:

I saw the movement that occurred there. (*Transcript* 89).

Q. Had you ever seen any movements like that before in the yards, previous to this time?

A. It is a common movement, an every day movement in every yard that I have ever been in.

After the train had coupled back they were going three or four miles an hour.

On cross-examination he testified as follows:

Q. How fast was the engine going when the string of cars coupled into this standing string?

A. That is something I can not say.

Q. Approximately?

A. Just moving up there easy.

Q. Just barely moving?

A. No, after they started to back up they gave the engine some steam and they started to go back. They were going about 3 or 4 miles an hour I should think. About as fast as a man could walk, about like that. That is about the gait it would take. (*Transcript* 90, 91.)

As against this positive testimony of the character of the movement, the plaintiff contends that the following testimony was sufficient to make a case for the jury on this issue. D. Elmer Murphy, who followed braking a part of the time, and who had worked in the Hillyard yards two nights five years before the trial (*Transcript* 54), which was about a year after the accident, testified on direct examination that he had known lots of fellows when they would move a string of cars four or five car lengths, uncouple the engine before they had placed the cars. If they wanted to place them four or five car lengths further

and the engine had hold of them, he would keep on shoving until he had shoved the entire length. (*Transcript* 55). On cross-examination he testified, however, that the occasion for shoving them in that particular manner would depend on what else was wanted to be done, or what other switching was wanted to be done in the yards (*Transcript* 56). He had observed lots of fellows uncouple engines when they made shoves in Hillyard such as he had described (*Transcript* 57). Cars are tied down with hand brakes on purpose to move them by throwing cars in against them and make more room for cars on the other end (*Transcript* 59). Even on redirect examination by plaintiff's counsel he further substantiated the position of the defendant:

> Q. Well, if it was intended to shove these cars further on to some other point, state whether or not they would crush other cars into them, as was done in this case, so as to move the whole string instantly, without taking the brakes off, if they are tied down?
>
> A. Yes, sir, I have seen it done, brake the cars to slow down the others, and not allow them to run too far. (*Transcript* 58, 59.)

Thomas Kneeland, another alleged expert, who had been working on a ranch, and who was out of work at the time of the trial, testified that the last place he worked was as helper at Vancouver, Washington (*Transcript* 59). He didn't pretend to have any experience in the Hillyard yards. All that he testified to with reference to the switch movement was:

Q. If there is a string of eight cars standing on a track in a yard and you want to move these cars up a distance for piling for instance, is there any necessity for making—for doing that by a kick switch?

A. Why, no, if they were kicked in there, there would be a man on them to see that they coupled, that a coupling was made. The proper way to do would be to place this engine and let him kick the head to see whether the cars were coupled up or not, because they are liable to run out the other end, if it is a yard where there is a hill at both ends.

Q. If the engine is coupled onto the end of the cars?

A. You ought to have a man on the hind end to see whether there is a brake step on there or not.

Q. They could be shoved in a distance of four car lengths and placed them without doing any kicking?

A. Yes, if there is room enough. (*Transcript* 59, 60.)

M. T. O'Brien, who was discharged from the employ of the defendant for his responsibility in a head-on collision in August, 1910, three years before the accident, testified that frequently in switching in the yards, other cars were frequently thrown down on several tracks, and if they were not going very fast they would stop themselves (*Transcript* 61). That in *coupling* a string of cars onto another string of eight or ten cars it was not necessary to move any of the standing cars at all (*Transcript* 61).

On cross-examination he testified, however, that if it was necessary to send them four or five car

lengths, *"you kick them after you couple into them"* and send them four or five car lengths (*Transcript* 62).

M. E. Snyder, who had a lawsuit against the defendant, which is still pending, testified that he had been a switch engineer, but that he had left the service on April 2nd, 1912, a year and a half before the accident; that if you want to *couple* a string of cars with a string of eight or ten cars, it isn't necessary to move any of the cars that were standing still (*Transcript* 63). It was customary there to couple onto them and shove them down (*Transcript* 63).

The most that the plaintiff's counsel can legitimately claim that this testimony shows is that when one string of cars is coupled onto another string of cars, it is not necessary to move the other string, but that if it is intended to move the second string the engine can keep on shoving them down, without cutting them off. There is not in this one syllable of proof which combats the defendant's position. The intention in this instance was to place these cars four or five car lengths further on, whether it was by a kick or a shove. Their own witness O'Brien testified that if it was intended to move them on four or five car lengths *"you kick them after you couple into them"* (*Transcript* 62).

But the distinction between kicks and shoves, cutting of cars before coupling is made and cutting of

cars afterwards, are all lost when the testimony of Mr. Garvin is taken into consideration. This is absolutely undisputed by any witness. Garvin has had over twenty years of actual yard experience in six different railroads, and was in charge of the coach yard of the Northern Pacific Railway Company at Spokane, and was familiar with the switching in the Hillyard yards. He had heard all of the testimony and had seen switch movements made in the Hillyard yards, similar to the one described in the testimony.

In coupling up cars he observed what the action was on the drawbars, slack in the cars and in the springs when the coupling was made. He testified that with ten cars there would be twenty feet of slack in the springs, and that with an engine going three or four miles an hour, when the impact goes against these cars they naturally spring apart; and that when the coupling was made the spring pressure goes up first before the end car moves, and then when it moves it moves suddenly (*Transcript* 92). This is the usual course when couplings are being made (*Transcript* 93). He observed every day movements similar to the one which took place at the time of the accident (*Transcript* 93). It would not take much force to send the cars suddenly and violently, turn the cars on the track or to make the head car move suddenly. It could be done with an engine going through at three and one-half miles per hour (*Transcript* 94).

Even the testimony of a ranchman out of a job, a man who had been a switchman for only two nights five years before the accident, an engineer who had been discharged for his responsibility in a head-on collision three years before the accident, and a switch engineer who had left the service of the company a year before the accident, and who was then suing the defendant, could not be made sufficient to properly make an issue for the jury on an alleged unusual, extraordinary or negligent movement. They all admitted that it was the usual and ordinary movement to keep on with the movement of the cars after they had been coupled up. That was all that was done here, and it was done in the manner described by their own witnesses as a proper method. But the result, whether a kick or a shove or the throwing in of cars onto another string, was the same. The impact of a shove going at three or four miles an hour, would necessarily result in making the end car move suddenly, on account of the springs in the couplings.

Every witness who saw the accident or the switch movement, or who heard it described, testified that it was the ordinary, usual, routine switching movement, and that it was going on every day in the yards. Their own witnesses who were called by them, Cantley and Farmer, could see no difference between this movement and the others that they had known there. The switchman, Miller; the foreman, Steinhouse; car repairer, Thomas; Bond, the assistant yardmaster; Gephart, the general yardmas-

ter, all of whom were witnesses to the accident; yard clerk, Leslie Anderson, and Garvin, the Northern Pacific yardmaster, all testified that it was the regular method of switching in the yards.

In this court it takes something more than some evidence, or any evidence, to make a case for the jury. There must be substantial evidence. In a case of this kind, with the evidence absolutely lacking—where there is no evidence to sustain a verdict—there should be judgment ordered for the defendant.

It may perhaps be claimed that because the defendant objected to certain questions asked of the witnesses, or that certain objections to such questions were sustained, upon the ground that they invaded the province of the jury, that it was thereby admitted by counsel or determined by the court, that there was an issue for the jury already made by the testimony on those questions. This is, of course, a *non sequitur*. Questions which in effect seek to elicit an opinion of the witness as to whether the defendant was negligent, or whether the plaintiff is entitled to recover, are clearly objectionable, whether or not there was or might be any evidence or no evidence to support the verdict. It was the duty of counsel to elicit the facts, and not to attempt to drag conclusions out of the witnesses, which were ultimately questions for the jury to decide—when and when only the plaintiff had produced sufficient evidence to make them such questions.

It was a common practice for the cars to move suddenly in the yards. Plaintiff's own witness Cantley testified that "You can't tell when cars were going to move" (*Transcript* 79). Kipple, when he instructed Mustell in his duties as car checker, told him that he always must expect trains moving at any moment, and to always keep clear of them (*Transcript* 84), and Cantley was told by Mustell himself that very morning that they were liable to switch there most any time and kick a bunch of cars in there and he would get hurt at it (*Transcript* 77).

With this testimony in the record, it is perfectly apparent that cars did move suddenly and quickly in the yards; that this was a usual occurrence, and that it was the duty of Mustell himself to expect such movement and that there was no negligence in a sudden and quick car movement.

Under the circumstance in this case, the rule stated in *Ryan v. Northern Pacific,* 53 Wash. 279, 101 Pac. 880, is directly apposite. Plaintiff in that case was employed by the railroad company as call boy in its freight yard office in Seattle. His duties called him back and forth across the yards, consisting of a large number of tracks. No one was permitted in the yards except employes. Plaintiff was engaged in learning his duties from his predecessor on the afternoon of his injury. He had gone out into the yard to tack some cards on certain freight cars there, and in returning they came to a string of about a dozen cars standing on an intervening track. Instead of

going around the cars they undertook to cross over them and as plaintiff was in the act of passing through, a car was shunted against the string and plaintiff was thrown off the car which he was attempting to cross and his right leg was run over. In response to the plaintiff's argument that the railway company was guilty of negligence on account of the manner in which the cars were handled in the yard, the court said:

> "The freight yards of the respondent were private yards. No one but employes were permitted therein. Anyone knowing how the yards and cars were operated did not need any further warning. The fact that whistles were not sounded and bells were not rung did not tend to show negligence, because under the conditions there, where numerous engines were running backwards and forwards, such sounds would only create confusion, and would afford no protection. No one was supposed to be about the cars except employes, who necessarily would know, immediately upon entering the yards, that cars were liable to be moved at any time without any warning. Even if the appellant was directed to go into the yards, he knew of the conditions and the places where he would be safe; and if he knew it was dangerous to cross a track where cars were not standing, as he testified he did, he must necessarily have known it was much more dangerous to cross over cars standing on such tracks. In view of the age and experience of the appellant as shown by his own evidence, we see no escape from the conclusion that his own negligence was the cause of his injury."
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> *Ryan v. N. P. R. R. Co,* 53 Wash. 279; 101 Pac. 880.

II.

MUSTELL WAS THOROUGHLY FAMILIAR WITH THE SWITCHING MOVEMENT, APPRECIATED ITS DANGER AND ASSUMED THE RISK.

The jury found that it was not the custom of defendant to place a head man on the car, when moved in the manner that this car was, or was negligent in failing to provide a rule for the warning of employes such as Mustell, and again found against the plaintiff on the question of negligence which was injected into the trial, as to whether or not a running switch had been made in violation of defendant's rules. In response to the question, "Did Mustell assume the risk?" they answered "No unusual risk" (*Transcript* 100). This, of course, did not answer the question categorically, and leaves the question of assumption of risk open for discussion. Even if it could be claimed that because the jury found that the movement was an extraordinary or unusual movement, that therefore the finding that he assumed no unusual risk was a finding that he did not assume the risk, the question still is open as to whether or not the evidence was substantially conclusive that as a matter of law, he did assume such risk, or whether there was not some evidence, or substantial evidence, which took away from the court this decision of assumption of risk, and made it a question for the jury.

Even assuming, for the purpose of argument, that

notwithstanding the conclusive character of the testimony showing that this was not an unusual or extraordinary movement, there was some evidence tending to show that the movement as made was negligent, the evidence does show, as a matter of law, that Mustell was thoroughly familiar with it, and appreciated its dangers.

The question of assumption of risk was raised by the motion to direct a verdict (*Transcript* 95) and the motion for judgment notwithstanding the verdict (*Transcript* 103) and is included in the assignment of error (*Transcript* 109), having been raised as a defense by the answer (*Transcript* 19).

Mustell's familiarity with the movements of trains in the yards there was expressly admitted by plaintiff's counsel in open court (*Transcript* 88). Henry Cantley testified: "As I said before, you can't tell when the cars are going to move" (*Transcript* 79), and further that Mustell had that very day been instructing him.

> "He said for me to be careful. I had a habit of climbing around on the cars, I was new at the work, and he told me to be careful about it; *that they were liable to switch there most any time and kick a bunch of cars in there,* and I would get hurt at it. That was that day. The accident occurred shortly after noon" (*Transcript* 77).

Kipple, who instructed Mustell in his duties, testified:

> *"I told him all about the different dangers,* such as approaching trains, switch engines, *crossing over tracks* or under cars or through cars and things of that kind, and told him to go down by the lead and then cross over, because he wouldn't make any time and that has always been my experience as long as I have been there. *I told him about the movement on the track; you always expect switch engines working at both ends; you could always expect trains moving at any moment and always keep clear of them"* (*Transcript* 84).

Upon cross-examination, Cantley in testifying with reference to the way the smoke was going up at the head end of the train said that when he glanced up there *he didn't have the purpose in mind of seeing if there was any danger;* that they couldn't tell when the cars were going to move; that although he didn't see anybody on top of the cars or any man on the ground or any indication of cars coming, he didn't think he was any more safe in crossing there than going around any other car; that they wouldn't have tried to have crossed if they thought that there was danger there, but that he didn't see any difference between the kicking of that car down there and the kicking of other cars that he had observed in the yards (*Transcript* 79).

The testimony of Cantley (*Transcript* 34, 39, 77, 80), Farmer (*Transcript* 80, 45, 47, 48), Miller (*Transcript* 69), Christopher (*Transcript* 72,) Steinhouse (*Transcript* 75, 76), Thomas (*Transcript* 82), Anderson (*Transcript* 84), Bond (*Transcript* 87),

Gephart (*Transcript* 89, 90) shows conclusively that this movement was an every day routine switching movement, which had occurred continuously many times a day for several years; that Mustell's duties as weighmaster (*Transcript* 71), night yard clerk, day yard clerk, manifest clerk and car checker (*Transcript* 62), his riding in the engine (*Transcript* 71), his being with Anderson when frequently simliar movements were made (*Transcript* 85) and the express admission of his familiarity with the train movements (*Transcript* 88), demonstrate to a certainty that he knew that such movements were likely to be made most any time, and that they were so dangerous that he had to keep clear of them. His passing within a few feet of the end of a car, which he admittedly knew was dangerous, besides being evidence of gross negligence on his part, shows that in so doing he voluntarily took the chance, and that he assumed the risk thereof. The statement of Cantley that they certainly would not have tried to cross if they thought there was danger there (*Transcript* 79) must be taken into consideration in connection with the balance of his testimony, that "I didn't have the purpose in mind of seeing if there was any danger," that they couldn't tell when the cars were going to move; that this car didn't kick any more quickly than other cars moving in the yards, Mustell's express instruction to Cantley on that very day that they were very liable to switch there most any time and kick a bunch of cars in there, Kipple's instructions to Mustell of the dangers

of crossing over tracks, and that he could always expect switch engines working and trains moving at any moment and always keep clear of them. Thomas' testimony that neither he nor Cantley were apparently paying a great deal of attention to where they were going, or anything; that they started to cross pretty close to the car, is, in connection with the testimony just referred to, positive proof that in crossing as he did, he was taking the risk which it necessarily involved.

It might be conceded, for the purpose of the argument only of this point, that the contention of plaintiff that this movement could have been made in a way which would not have involved the quick movement of the car nearest Mustell, in the manner in which that car was moved, but in view of the uncontradicted testimony of the frequency of this very movement during Mustell's employment, and his continuance in that employment for years prior to the time of the accident, while this movement was going on, necessarily charges him, not only with the knowledge, but with the appreciation of his danger, for it was open and apparent. Moreover, and beyond this, we have express and direct testimony as to such appreciation, and the only conclusion which can properly be drawn from the evidence is that he was thoroughly familiar with the switching movements in the yards, of which this movement was one; that he appreciated the danger of it, and assumed its risks.

Where it was customary to kick cars in on different tracks in the yards, and the field man, Voelker, was injured by reason of a sudden kicking in of a second string of cars on a string already there, and between the cars of which Voelker had stepped to open the knuckles of one of the cars, the court held that he would assume the risk.

> "If it was general and uniform, and was observed during his continuance in the service, it was manifestly within, not merely his means of knowledge, but his actual knowledge. He was an experienced railroad employee, and was familiar with this branch of that service, having been in defendant's employ as a brakeman and switchman for a period of eight years. He therefore understood the dangers incident to the observance of such a custom. There can be no claim, under the evidence, that the injury was wilfully and wantonly inflicted. Nor was the custom an unreasonable one. Whether or not there was occasion to go between the cars, and thus assume a position of exposure to injury from the movement of other cars, would be known to the field man, but not to the switching crew. His position would enable him to judge of the character and probable duration of the exposure better than could be done by others. He would be primarily in a place of safety, would know that the work in which he was engaged was, in a larger sense, that of moving cars and making up trains, and, being in control of his movements, would not assume a position of danger without some volition of his own. If, in the presence and during the observance of a general and uniform custom of the character stated, Voelker continued in the service of defendant, he assumed the risk of injury arising from its observance."
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> *Chicago, M. & St. P. R. R. Co. v. Voelker,* 70 L. R. A. 271; 129 Fed. 522.

A switchman employed in yards, who was killed while uncoupling cars by the impact given to the cars on one side of him by cars of a train backing in from that direction, without warning, was held to have assumed the risk.

"But the deceased was a competent man. He had been employed in that yard as a switchman for eight or nine months, and was familiar with the manner in which the business was carried on. It is true that during that time he was at work in that part of the yard known as the 'running yard,' out of which cars were run into that part where the cars needing repairs were separated, and switched off upon different tracks according to the gravity of the necessity for repairs. But his experience there was in a place where he had equal means of information in regard to the management of trains or cars sent thence into the next yard as if he had been in the yards into which they were taken. The taking out and the taking in of trains were parts of the same operation. On the morning of the accident he had been directed to take charge of a switching crew in that part of the yard where some care needing repairs were collected and which were required to be sorted out and separated; and, although a foreman, was doing work belonging to a switchman, a thing shown to be not unusual. The manner of the switching and the movements of cars that day was not different from that which had been pursued during the whole period of his employment in the yard. If this accident had happened directly after his employment began, it might have been said that he had the right to rely upon the presumption that his employer had taken proper precautions for making the business reasonably safe for its employes. And the same rule would have held good if the sources

of danger were beyond his ken, and the employer had permitted them to continue while the servant was in his employment, for the employe does not assume risks which are not apparent and of which he knows nothing. But here the dangers were not obscure. On the contrary, they were perfectly obvious, as open to the deceased as to any one, and had been for a long time. The case is one falling within the exception to the rule above stated. The exception is, as stated by Mr. Justice Day in Choctaw, etc., R. R. Co. v. McDade, 191 U. S. 64, 68; 24 Sup. Ct. 24, 25; 48 L. Ed. 96:

'That when a defect is known to the employe, or is so patent as to be readily observed by him, he cannot continue to use the defective apparatus in the face of knowledge, and without objection, without assuming the hazard incident to such situation.' "

Nelson v. Southern Ry. Co., 158 Fed. 92.

See also

Collins vs. Pa. R. Co., 148 N. Y. S. 777.

Landicino vs. Chicago & Alton Ry., 171 Ill. App. 396.

It conclusively appears from the evidence that Mustell was an experienced yard employe, thoroughly familiar with movements in the yards, perfectly well aware of the danger in crossing tracks close to the cars, and had an active appreciation of it, which is shown by instructions given to him and by him. Neither he nor the man who was with him were paying any particular attention to what was going on, on the track over which they were crossing, and he passed close to the end of the car, within three or four feet of it, when any coupling made for the purpose of accomplishing the movement which

was intended in this case, of shoving or placing of the cars three or four more car lengths must necessarily result in that car moving suddenly. Under the facts in this case it is perfectly clear that not only was there no negligence upon the part of the defendant, but that Mustell assumed the risks of the movement, as made. Not only upon the findings of the jury that the defendant was not guilty of negligence in failing to promulgate a rule to warn Mustell, and the further findings that this was not a running switch in violation of the rules of the company, nor was it customary to place a man at the end of the car to warn him, taken in connection with the evidence upon the question of the unusual or extraordinary character of the movement, and the assumption of risk is the defendant entitled to a judgment in its favor, but upon the whole case and on all the questions the record disclosed the entire absence of evidence to show any negligence on defendant's part.

We well understand the rule of this court with reference to special findings and the consideration of the sufficiency of the evidence to support them, and in this case there is not only an insufficiency of such evidence, but an entire failure of proof to support the finding that this was an extraordinary or unusual movement or that the plaintiff did not assume the risk, if the answer of the jury that he did not assume

any unusual risk can be construed to mean that he did not assume the risk in this case. In considering the effect of the findings, the court will understand that these findings were finally submitted over defendant's objection (*Transcript* 99). We do not believe that this court will hold that after the defendant has challenged the sufficiency of the evidence to sustain any verdict, by a motion to direct a verdict, and moved to exclude from the consideration of the jury, on account of lack of evidence to support any verdict in favor of the plaintiff thereon, the only question upon which any finding of negligence was made, and further objected to the submission of the special findings, that because such special findings were submitted and answered, that thereby the defendant in this state of the record, is precluded from discussing the question of the entire lack of evidence to sustain any finding which would support any verdict in favor of the plaintiff.

The motion to direct a verdict was denied upon the understanding that either the court below or this court could order judgment notwithstanding the verdict, and the court below having decided such motion without argument, the case is now before this court for the rendition of substantial justice. In the consideration of the decision thereon, we respectfully submit that the entire record discloses no negligence upon the part of the defendant, and it

is demonstrated, as clearly as testimony can, that the plaintiff's intestate assumed the risk.

Respectfully submitted,

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